In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 494

STANLEY JOHN FLAKOWICZ, PETITIONER

v.

MYRL E. ALEXANDER, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

On June 8, 1944, petitioner was convicted in the United States District Court for the Eastern District of New York of having failed to report for induction, in violation of Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. App. 311), and he was sentenced to imprisonment for three years (R. 27–28). The evidence adduced at the trial showed that on January 31, 1944, petitioner was given a pre-induction physical examination and was found to be physically acceptable by the Army. He was thereafter ordered to report for induction on March 8, 1944, and he refused. (See R. 15–16.)

Relying on the decision in *Falbo* v. *United States*, 320 U. S. 549, the trial court rejected petitioner's tendered defense of illegal classification (see R. 19). Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment of conviction was affirmed. 146 F. 2d 874. Petitioner then filed a petition for a writ of certiorari (No. 1072, Oct. T. 1944); the Government filed a Memorandum in Opposition, in which it was pointed out that petitioner's acceptability for military service would have been finally determined when he reported for induction and, therefore, that he had not exhausted his administrative remedies; and this Court denied certiorari. 325 U. S. 851. In *Sunal* v. *Large*, 332 U. S. 174, 178, this Court explained that certiorari was denied in petitioner's case because "it, like *Falbo* v. *United States, supra,* was one where the administrative remedies had not been exhausted, there being an additional examination which the registrant had not taken."

On November 12, 1946, petitioner filed a petition for a writ of habeas corpus in the District Court for the District of Connecticut, where he was then confined, challenging the legality of his selective-service classification and of the judgment of conviction (R. 8–26). The writ issued (R. 31–32), respondent filed a return (R. 33–39), and the court thereafter ordered petitioner discharged from respondent's custody on the ground that petitioner had been finally ac-

cepted for military service and therefore the convicting court exceeded its jurisdiction in rejecting the tendered defense of misclassification (R. 40–46, 47–51).

Upon respondent's appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was reversed and the cause remanded with directions to dismiss the writ (R. 65–66). The opinion (R. 60–65) of the circuit court of appeals analyzes the pertinent regulations which were applicable in petitioner's case and demonstrates that by failing to report for induction petitioner failed to undergo the final physical examination, and thus that he failed to exhaust his administrative remedies. The opinion specifically stresses (R. 64) this Court's characterization of petitioner's case, as stated in *Sunal* v. *Large, supra.*

The petition for a writ of certiorari in this Court still urges that the administrative remedies were exhausted when petitioner passed his pre-induction physical examination and that the defense of misclassification therefore was open to him. As the recital of the facts shows, that issue was before this Court on the petition for a writ of certiorari to review the judgment of conviction; it was considered by this Court in *Sunal* v. *Large, supra;* and it has now been resolved against petitioner by the court below. For the reasons stated by this Court in the *Sunal* case and in the opinion of the court below, it is apparent that petitioner's contention is still without merit.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solictor General.
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